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No. 82-730

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALEXANDER F. EAGLE,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
a corporation,
Real Party in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Real Party in Interest's Brief In Opposition to Petition for a Writ of Certiorari

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AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation,
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STATEMENT OF THE CASE

Petitioner, a shareholder of The Pacific Telephone & Telegraph Company ("Pacific"), instituted a class action in California Superior Court against American Telephone and Telegraph Company ("AT&T"), on behalf of a purported class consisting of all Pacific shareholders except

1. The parties are set forth in the title; real party in interest American Telephone & Telegraph Company owns stock in the following publicly owned corporations:
Southern New England Telephone Company
Cincinnati Bell, Inc.

AT&T. The complaint alleged that AT&T, which owned approximately 90 percent of Pacific's voting shares during the time in question,[2] "us[ed] Pacific for [AT&T's] advantage in violation of the rights of all minority shareholders" (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 4) and that AT&T's conduct resulted in an order by the California Public Utilities Commission requiring Pacific to refund $381 million to its customers (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 7).

Petitioner alleged that the minority shareholders' injuries "correspond to the number of shares each owns in Pacific" (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 4), and that "plaintiff and the class members have been damaged in the amount of at least $38,000,000" (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 8)—an amount approximately equal to 10 percent of the $381 million refund in question.[3] No individual damages were alleged or claimed by petitioner in the complaint.

AT&T removed the action to the United States District Court for the Northern District of California, which denied petitioner's motion to remand the case to state court (Cert. Pet., Appx. B, p. 1). Petitioner amended his complaint and again moved for remand; the district court denied this second motion on the ground that "[s]ubsequent amendment of a pleading can have no effect on jurisdiction once it has attached" (Cert.Pet., Appx. B, p. 2). The district court also denied petitioner's motion for permission for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (Cert.Pet., Appx. B, p. 3).

The Court of Appeals for the Ninth Circuit denied a petition for writ of mandamus, relying upon *Ex Parte Harding* (1911) 219 U.S. 363 (Cert.Pet., Appx. B, p. 4).

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2. Pacific is now a wholly owned subsidiary of AT&T.

3. The complaint also sought $20 million punitive damages (Pet. for Mandamus (9 Cir.) Exh. A, ¶ 10).

ARGUMENT

Petitioner's argument to this Court is based on the erroneous assertion that the Court of Appeals misinterpreted *Ex Parte Harding* (1911) 219 U.S. 363 in denying mandamus to review a district court order denying a motion to remand the case to state court. The decision below was entirely consistent with this Court's decisions in *Ex Parte Harding* and subsequent cases: "This Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed" (*Roche v. Evaporated Milk Assn.* (1943) 319 U.S. 21, 30).

Contrary to petitioner's assertion, the Court of Appeals did not reach the question whether the jurisdictional amount was satisfied. In any event, the district court properly ruled that this action was removable because petitioner seeks to create a common fund in excess of the jurisdictional amount.

I. THE RULING BELOW—THAT MANDAMUS IS NOT AVAILABLE TO REVIEW A DISTRICT COURT ORDER DENYING A MOTION TO REMAND A CASE TO STATE COURT—IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

It is settled by *Ex Parte Harding* (1911) 219 U.S. 363 and subsequent decisions of this Court that, as the court below held, mandamus is not available to review a district court order denying a motion to remand a case to state court:

> "[In *Harding*] the subject was extensively considered and it was held that the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error or an appeal" (*Ex Parte Roe* (1914) 234 U.S. 70, 73).

The crux of petitioner's position, before both this Court and the court below, is the erroneous assertion that the district court order denying remand is "nonappealable" (Cert.Pet., p. 11). But the order denying remand is reviewable on appeal from a final judgment (*American Fire & Cas. Co. v. Finn* (1951) 341 U.S. 6, 18-19)—petitioner will then have an opportunity to challenge the removal jurisdiction of the district court.

There is no basis for petitioner's contention (Cert.Pet., pp. 12-13) that mandamus is justified because seeking review of the district court order on appeal may be inconvenient and expensive:

> "[*Harding*] also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule" (*Ex Parte Park Sq. Automobile Station* (1917) 244 U.S. 412, 416; accord, *Roche v. Evaporated Milk Assn.* (1943) 319 U.S. 21, 31).

Petitioner also contends that the ruling below is inconsistent with *Will v. United States* (1967) 389 U.S. 90 (Cert. Pet., pp. 14-15, 19). But *Will* explicitly recognized that

> "[c]ourts faced with petitions for the preemptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous" (389 U.S. 98, n. 6).

A fortiori, the court below properly denied review by mandamus of an order reviewable on appeal from a final judgment.

Petitioner's criticism of the holding in *American Fire & Cas. Co. v. Finn* (1951) 341 U.S. 6, that a party removing a case to district court may later challenge a final judgment on the ground of lack of jurisdiction (Cert.Pet., pp. 16-17), misses the point: the Court of Appeals ruled only that *petitioner* could not use mandamus to obtain interlocutory review of the district court's order; nothing in the decision below speaks to the issue of whether *AT&T* would be able to challenge jurisdiction after a final judgment (Cert.Pet., Appx. B, p. 4).

II. THE COURT OF APPEALS DID NOT RULE ON THE ISSUE OF WHETHER THE JURISDICTIONAL AMOUNT WAS SATISFIED. IN ANY EVENT, THE DISTRICT COURT PROPERLY RULED THAT THIS ACTION WAS REMOVABLE.

Petitioner erroneously asserts that this case presents a question as to whether "the District Court lacked original jurisdiction because Petitioner's claim is less than the amount required" (Cert.Pet., p. 25). The decision below did not reach the issue of whether the amount in controversy was satisfied (Cert.Pet., Appx. B, p. 4). Thus, petitioner's argument that certiorari should be granted because the district court lacked jurisdiction (Cert.Pet., pp. 19-24, 25-26) is irrelevant.

In any event, the district court properly rejected petitioner's contention that the jurisdictional amount was not satisfied. Petitioner's complaint sought a fund of $38 million damages for the class, as well as $20 million punitive damages (Pet.for Mandamus (9 Cir.) Exh. A, ¶¶ 8, 10).[4] The complaint did not allege individual damages to petitioner or to any member of the class (Pet.for Mandamus (9 Cir.)

4. Removal jurisdiction is determined "according to the plaintiffs' pleading at the time of the petition for removal" (*Pullman Co. v. Jenkins* (1939) 305 U.S. 534, 537).

Exh. A, ¶ 4). Where, as here, plaintiffs jointly seek recovery of a single fund, "it is enough if their interests collectively equal the jurisdictional amount" (*Troy Bank v. Whitehead & Co.* (1911) 222 U.S. 39, 41; *Snyder v. Harris* (1969) 394 U.S. 332, 335).[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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5. The complaint alleged that the damages to the minority shareholders resulted from depletion of the assets of Pacific and an accompanying loss of dividends (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 7). Under California law, the shareholders' interest in both dividends and assets of a company is a common and undivided interest (*Oilwell etc. Co. v. Petroleum etc. Co.* (1944) 64 Cal.App.2d 367; *Atkins v. Gamble* (1871) 42 Cal. 86, 99).